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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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NATIONAL DAY LABORER ORGANIZING
NETWORK; CENTER FOR CONSTITUTIONAL
RIGHTS; and IMMIGRATION JUSTICE
CLINIC OF THE BENJAMIN N. CARDOZO
SCHOOL OF LAW,

Plaintiffs.

v.

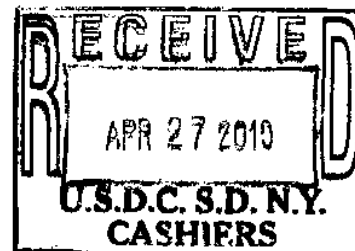
UNITED STATES IMMIGRATION
AND CUSTOMS ENFORCEMENT AGENCY;
UNITED STATES DEPARTMENT OF
HOMELAND SECURITY; EXECUTIVE
OFFICE FOR IMMIGRATION REVIEW;
FEDERAL BUREAU OF INVESTIGATION;
and OFFICE OF LEGAL COUNSEL,

Defendants.

-----X

Civil Action No.:

COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF



COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, *et seq.*, for declaratory, injunctive, and other appropriate relief to compel the release of agency records improperly withheld from Plaintiffs, National Day Laborer Organizing Network ("NDLON"), Center for Constitutional Rights ("CCR"), and Immigration Justice Clinic of the Benjamin N. Cardozo School of Law ("the Immigration Justice Clinic" or "the Clinic") (collectively "Plaintiffs"), by Defendants, U.S. Immigration and Customs Enforcement Agency ("ICE"), U.S. Department of Homeland Security ("DHS"), Executive Office for Immigration Review ("EOIR"), Federal Bureau of Investigation ("FBI"), and Office of Legal Counsel ("OLC") (collectively "Defendants").

2. Plaintiffs seek the release of records on a matter of significant public concern: documents related to ICE's immigration enforcement program "Secure Communities."
3. Secure Communities subjects people interacting with the criminal justice system to an automatic and indiscriminate civil immigration investigation. Through Secure Communities, ICE identifies large numbers of people for deportation by cross-checking fingerprints submitted through criminal FBI fingerprint queries against error-prone civil immigration databases. According to ICE, Secure Communities will also involve a dramatic expansion of the existing immigration detention and removal system.
4. The program is in its pilot phase and currently operating in at least 145 jurisdictions. ICE expects to extend it to every jail in the country by 2013.¹
5. Despite the immense scale of Secure Communities, ICE has released little information about it to the public. The limited information available is vague and conflicting. Significant details are unknown, including: the methods by which Secure Communities operates; the implementation process for Secure Communities in local jurisdictions; whether local jurisdictions can decide not to participate; whether any congressional or agency oversight mechanisms exist; the policies and procedures ICE has in place to pursue its mandate of prioritizing the identification of "dangerous criminal aliens"; and details about Secure Communities' expansion and "transformation" of the immigration detention and removal system. ICE has failed to clarify the fiscal impact of Secure Communities on federal, state, and local governments, or the program's impact on community relations with local law enforcement agencies. Nor has ICE identified

¹ See Press Release, Immigration and Customs Enforcement, Secure Communities Activated in More Virginia Communities (Apr. 13, 2010), <http://www.ice.gov/pi/nr/1004/100413fairfax.htm>.

mechanisms for addressing racial profiling or the misidentification of United States citizens and other individuals not subject to removal.

6. In light of ICE's intention to expand Secure Communities, Plaintiffs seek information necessary to facilitate meaningful public discourse and increase government transparency. Community members, as well as state and local government officials, urgently need the information sought by Plaintiffs to make appropriate decisions about implementing the program and conducting oversight.

7. NDLO, CCR, and the Clinic submitted FOIA requests ("Plaintiffs' Requests") to Defendants on February 3, 2010, seeking records related to Secure Communities. Plaintiffs sought records related to policies, procedures, and objectives; data and statistical information; individuals subject to Secure Communities queries or ICE detainers; fiscal impact; agency communications; program assessment; and complaint mechanisms and oversight.

8. Despite the urgent public need for information about Secure Communities as ICE continues to expand the program,² Defendants have failed to respond to Plaintiffs' Requests within the statutory timeframe.

9. To vindicate the public's right to information about practices and policies relating to the ongoing implementation and expansion of Secure Communities, Plaintiffs seek declaratory, injunctive, and other appropriate relief to compel Defendants to immediately process Plaintiffs' Requests and release records that have been unlawfully withheld.

² ICE has expanded Secure Communities to at least 27 new jurisdictions since the February 3, 2010 requests. *See id.*

JURISDICTION AND VENUE

10. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. §§ 552(a)(4)(B) and 522(a)(6)(C)(i). This Court also has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1346(a)(2).

11. Venue lies in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §§ 1391(e) and 1402(a).

PARTIES

12. Plaintiff NDLO is a non-profit organization founded in 2001 whose mission is to improve the lives of immigrant day laborers in the United States through nationwide advocacy and organizing efforts in coordination with thirty-eight member organizations in fifteen states. Toward this end, NDLO seeks to strengthen, connect, and expand the work of its member organizations in order to become more effective and strategic in building leadership and advancing low-wage worker and immigrant rights. The office and principal place of business of NDLO is located in Los Angeles County, California.

13. Plaintiff CCR is a New York-based legal and public education not-for-profit organization that engages in litigation, legal research, and the production of publications in the fields of civil and international human rights, including materials on immigration enforcement. CCR publishes regular newsletters, know-your-rights handbooks, and other informational materials for public dissemination. These materials are also available through CCR's Development, Communications, and Education and Outreach Departments. CCR operates a website, www.ccrjustice.org, that addresses the issues on which CCR works. The website includes material on topical civil and human rights issues and material concerning CCR's work. In addition, CCR maintains a comprehensive

Secure Communities website, www.ccrjustice.org/secure-communities, which will serve as a resource to community members and a mechanism to disseminate information disclosed pursuant to FOIA. All of this material is free to the public. The office and principal place of business of CCR is located in New York County, New York.

14. Plaintiff Immigration Justice Clinic was founded in 2008 to provide quality *pro bono* legal representation to indigent immigrants facing deportation as well as community-based organizations in public policy and litigation projects. In its first two years of existence, the Clinic has already established itself as a leader in the dissemination of critically important information about immigration enforcement operations to the public. In February 2009, the Clinic issued a press release and disseminated previously unavailable secret memoranda and data obtained through FOIA litigation that was related to ICE home raid operations, resulting in widespread national media coverage. In July 2009, the Clinic published the first public study of ICE's home raid operations, also drawing on data from FOIA litigation. The report played a critical role in informing the public of widespread constitutional violations and other abuses, again attracting significant national media attention, and ultimately leading to significant policy changes by ICE. These materials are freely available to the public on the Clinic's website. The Clinic's office and principal place of business is located in New York County, New York.

15. Defendant DHS is a Department of the Executive Branch of the United States. Defendant ICE is a component of DHS. Both DHS and ICE are "agencies" within the meaning of 5 U.S.C. § 552(f)(1).

16. Defendants EOIR, FBI, and OLC are components of the Department of Justice (“DOJ”), a Department of the Executive Branch of the United States, and each is an “agency” within the meaning of 5 U.S.C. § 552(f)(1).

STATEMENT OF FACTS

17. All statements made herein are made upon information and belief except where the basis of knowledge is specifically stated.

I. ICE Is Rapidly Implementing Secure Communities Nationwide Without Sufficient Transparency, Oversight, or Public Engagement

18. ICE has withheld from the public even the most basic information about Secure Communities’ implementation and effects, including, but not limited to: 1) the mechanisms Secure Communities uses to avoid errors within its automated identification process; 2) ICE’s policies and procedures relating to the targeting of individuals for detention and removal; 3) details about Secure Communities’ dramatic expansion of the immigration detention and removal system; 4) the implications of Secure Communities for local communities, crime victims, and individual civil liberties; and, 5) the method by which ICE negotiates agreements to implement the program in states and localities.

A. Secure Communities Employs an Unreliable Automated Identification Process Lacking in Transparency and Accountability

19. The central component of Secure Communities appears to be an electronic database interoperability system whereby ICE maintains a technological presence in local jails and prisons throughout the country.

20. Local law enforcement officials routinely perform fingerprint screenings after arrests and submit the fingerprints to the FBI’s Integrated Automated Fingerprint Identification System (“IAFIS”), a criminal records database maintained by the FBI

Criminal Justice Information Services Division (“CJIS”). The Secure Communities database system redirects these fingerprints to error-prone civil immigration databases.

21. Secure Communities relies on two central DHS databases of immigration information—the U.S. Visitor and Immigrant Status Indicator Technology Program (“US-VISIT”) and the Automated Biometric Identification System (“IDENT”). Both US-VISIT and IDENT have been riddled with errors and inaccuracies since their introduction. The DOJ Office of the Inspector General issued a report that concluded that immigration databases “continue[] to face significant data accuracy problems . . . caused by data entry errors, incompatibilities between the systems, and the lack of a system for correcting data inaccuracies.”³

22. In the first year of Secure Communities, ICE subjected nearly one million individuals, including U.S. citizens and green card holders, to this clandestine immigration investigation.⁴

23. Database inaccuracies are particularly concerning in the case of U.S. citizens. False “matches” under Secure Communities are likely in the context of derivative citizens, foreign-born individuals who become U.S. citizens by operation of law when one of their parents naturalizes. Because derivative citizens gain citizenship automatically, without the intervention of any government agency, they are likely to appear as potentially removable non-citizens in a DHS database. This likelihood is

³ Dep’t of Justice, Office of Inspector General, Evaluation and Inspectors Division, No. I-2003-004, *The Immigration and Naturalization Service’s Removal of Aliens Issued Final Orders*, at v. (Feb. 2003), *available at* www.justice.gov/oig/reports/INS/e0304/final.pdf.

⁴ *See* Press Release, Immigration and Customs Enforcement, New ICE Initiative Launched in 3 Georgia Counties (Nov. 17, 2009), <http://www.ice.gov/pi/nr/0911/091117atlanta.htm>.

compounded by the fact that many derivative citizens are not aware of their citizenship status.

24. Since 2008, Secure Communities has identified more than 5,800 United States citizens as database “matches.”⁵

25. FOIA disclosure is an essential step towards understanding and correcting the fundamental failings of the identification mechanisms on which Secure Communities relies.

B. ICE Has Not Disclosed Policies and Procedures Relating to Case Processing or Detainer Issuance

26. In the next stage of the Secure Communities process, the ICE Law Enforcement Support Center (“LESC”) is notified of any fingerprint matches in the immigration databases. The LESC “processes” the matches to determine whether the individual may be removable. Information about this process is not publicly available.⁶

27. ICE then determines whether to issue an immigration detainer to the local authorities with custody of the subject.⁷ Once ICE issues a detainer, the individual may be held by the local or state jurisdiction for up to forty-eight hours after they would

⁵ See *id.*; Julia Preston, *U.S. Identifies 111,000 Immigrants with Criminal Records*, N.Y. Times, Nov. 13, 2009, at A13 (“According to ICE figures, about 5,880 people identified through the program turned out to be United States citizens.”); Diane Solis, *Secure Communities Databases Net Arrests of About 22,000 Illegal Immigrants*, Dallas Morning News, Nov. 13, 2009, <http://carrolltonblog.dallasnews.com/archives/2009/11/secure-communities-databases-n.html> (“Of the 12 percent [of individuals Secure Communities identified as foreign born], about 5,900 people were U.S. citizens, which raises questions about database flaws.”).

⁶ See Dep’t of Homeland Security, Immigration and Customs Enforcement, Secure Communities Standard Operating Procedures 4 (Sept. 30, 2009) [hereinafter ICE Standard Operating Procedures], available at http://www.ice.gov/doclib/foia/secure_communities/securecommunitiesops93009.pdf.

⁷ ICE Standard Operating Procedures, *supra* note 6, at 4-5.

otherwise have been released, in order to facilitate transfer to ICE custody. 8 C.F.R. § 287.7(d) (2010).

28. ICE has not disclosed how it makes the determination about whether to issue a detainer; any measures in place to prevent errors and abuses; or whether it considers relevant factors such as an individual's age, health, pregnancy, or whether the individual is a crime victim.

29. ICE states that Secure Communities will prioritize the removal of "the most dangerous criminal aliens."⁸ ICE purports to classify offenses into three categories of seriousness and prioritize the most serious category of offenses.⁹

30. The few statistics ICE has released about the Secure Communities' pilot phase, however, indicate that ICE is not following a prioritization scheme. As of November 2009, only ten percent of the individuals identified through Secure Communities had been charged with or convicted of the most serious category of crimes, while ninety percent of detainees have been issued for people who do not fall into the highest priority category.¹⁰

31. In addition to failing to release information about the procedures it follows in processing individual cases and targeting individuals for detention, ICE has also failed to explain statements about the drastic changes to the existing ICE enforcement scheme that Secure Communities will require.

⁸ Immigration and Customs Enforcement, Secure Communities Fact Sheet 1 (Sept. 1, 2009), http://www.ice.gov/doclib/pi/news/factsheets/secure_communities.pdf.

⁹ ICE Standard Operating Procedures, *supra* note 6, at 5.

¹⁰ Press Release, Immigration and Customs Enforcement, Secretary Napolitano and ICE Assistant Secretary Morton Announce That the Secure Communities Program Identified More Than 111,000 Criminal Aliens in Its First Year (Nov. 12, 2009), <http://www.ice.gov/pi/nr/0911/091112washington.htm>.

C. ICE Has Not Disclosed Details About Its Plan to Expand the Immigration Detention and Removal System as an Element of Secure Communities

32. ICE states that another element of Secure Communities is the expansion of the flawed immigration detention and removal system.

33. When ICE lodges a civil immigration detainer against an individual who has been identified through the Secure Communities process, that person is generally transferred to ICE custody and enters ICE's detention and removal system.

34. ICE acknowledges that Secure Communities will "dramatically increase" the number of individuals entering the detention and removal system, and ICE claims the program will "boost its capabilities to arrest, process, detain, and ultimately remove aliens from the United States."¹¹ ICE's predictions about increased detention rates are confirmed by the experience of at least one jurisdiction participating in the pilot phase.¹²

35. The current detention and removal system is already plagued with well-documented and pervasive problems. Studies of individual detention facilities and of the immigration detention system as a whole conducted by government experts, journalists, and other observers have resulted in extensive criticism for, *inter alia*, unacceptable health and safety conditions, insufficient access to communications and legal services, extensive due process violations, and a lack of uniform and binding standards and guidelines.¹³

¹¹ Secure Communities Fact Sheet, *supra* note 8, at 2.

¹² See, e.g., Susan Carroll & Bradley Olson, *Cost Sidelines: Parker Promise to Use ICE Initiative at City Jail*, Houston Chronicle, Feb. 24, 2010, available at <http://www.chron.com/dispatch/story.mpl/metropolitan/6884140.html> (citing Houston Assistant Police Chief Dan Perales' statement that ICE filed detainers on more suspects in the first two months after implementation of Secure Communities than it had in the previous year).

¹³ See e.g., Dora Schriro, Immigration and Customs Enforcement, Immigration Detention Overview and Recommendations (Oct. 6, 2009), available at <http://www.ice.gov/doclib>

36. The expansion of ICE detention and removal will lead to an increased risk of errors, due process violations, and increased costs throughout the detention and removal process. However, ICE has not publicly addressed how it will manage the high volume of individuals that the new initiative will sweep into an already overcrowded system,¹⁴ adding to the backlogs of already overburdened immigration courts.¹⁵

37. FOIA disclosure about ICE's plans to manage the dramatic increase in the volume of the detained population in ICE custody will allow the public to coordinate oversight and hold ICE accountable.

D. ICE Has Not Disclosed Basic Information About the Impact of Secure Communities on Local Communities and Civil Liberties

38. Through Secure Communities, ICE intends to have a technological presence in every jail in the country by 2013. Still, ICE has failed to address publicly concerns regarding the program's long-term impact on communities, or to propose mechanisms that prevent it from hindering local law enforcement and eroding community relations.

/091005_ice_detention_report-final.pdf; Dep't of Homeland Sec., Office of Inspector Gen., OIG-10-13, Immigrations and Customs Enforcement Policies and Procedures Related to Detainee Transfers (Nov. 2009), *available at* http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_10-13_Nov09.pdf; The Constitution Project, Recommendations for Reforming our Immigration Detention System and Promoting Access to Counsel in Immigration Proceedings (Oct. 2009), *available at* <http://www.constitutionproject.org/manage/file/359.pdf>; Human Rights Comm., U.N. Special Rapporteur on the Human Rights of Migrants, Mission to the United States of America, U.N. Doc. A/HRC/7/12/Add.2 (Mar. 5, 2008) *available at* <http://texascivilrightsreview.org/tcrr/docs/bustamante08a.pdf>; Amnesty International, Jailed Without Justice: Immigration Detention in the USA (May 2009), *available at* <http://www.amnestyusa.org/uploads/JailedWithoutJustice.pdf>; American Bar Association, Ensuring Fairness and Due Process in Immigration Proceedings (Dec. 2008), *available at* http://www.abanet.org/poladv/transition/2008dec_immigration.pdf.

¹⁴ See Schriro, *supra* note 13, at 13.

¹⁵ Transactional Records Access Clearinghouse, Backlogs in Immigration Courts Expand, Wait Times Grow (Jun. 18, 2009), <http://trac.syr.edu/immigration/reports/208/>.

39. Secure Communities increases the already significant financial strain on states and localities by imposing additional costs for detaining individuals subject to civil immigration detainers, sometimes throughout the pendency of criminal proceedings and often after they would otherwise have been released on bail, on their own recognizance, or at the conclusion of their criminal proceedings.¹⁶ Once an immigration detainer is in place, the person will not be released on bail in any pending criminal proceedings, even if the criminal court determines the individual is not a flight risk or a danger to the community. Local jurisdictions absorb significant costs incurred for detaining individuals on immigration detainers and are not reimbursed by ICE.

40. ICE has not provided any financial resources to alleviate this strain or guidance on how to balance other financial burdens.

41. Local communities are concerned that incorporating immigration enforcement into local jails undermines law enforcement-community relationships because individuals will be afraid to report crimes, especially in domestic incidents.¹⁷ Secure Communities may also incentivize law enforcement officers to subject members of immigrant communities to pre-textual discretionary arrests, knowing that regardless of the legality

¹⁶ 8 C.F.R. 287.7(d) (2010).

¹⁷ See, e.g., Susan Carroll & James Pinkerton, *HPD Fighting Lack of Trust on Some Calls*, Houston Chronicle, Feb. 22, 2010, available at <http://www.chron.com/dispatch/story.mpl/metropolitan/6878331.html> (detailing how an immigrant witness' decision not report a crime for fear of immigration consequences led to his brother's murder, and stating that "[the Houston Police Department's] relationship with local immigrant communities has suffered" due to the city's consideration of 287(g) and implementation of Secure Communities); Ben Sanders, *Houston's Illegal Immigrants Get One More Reason Not To Talk to Cops*, Reason, Feb. 23, 2010, <http://reason.com/blog/2010/02/23/houstons-illegal-immigrants-ge> (stating that "[s]ince Houston partnered with [ICE] in the Secure Communities program to run automated immigration checks on all detainees, members of Houston's immigrant communities have been increasingly reluctant to speak with the police").

or outcome of the arrest, Secure Communities will automatically subject the individual to a civil immigration investigation.¹⁸

42. Despite Secure Communities' potential to impact negatively public safety and civil liberties, ICE has not released any information regarding training or guidance for local partners, or other mechanisms to protect public safety and local communities.

43. It is difficult to assess the extent of problems posed by Secure Communities to date, because ICE has not made available data or statistics regarding the error rate of Secure Communities identifications, policies regarding redress procedures or oversight, evaluations of the program's effectiveness, or even the vast majority of agreements that it ostensibly has negotiated with states and localities.

¹⁸ See Orange County Board of Commissioners, Recommendations from the Human Relations Commission Concerning the "Secure Communities" Program in Orange County 6 (Jan. 21, 2010), *available at* <http://www.co.orange.nc.us/OCCLERKS/1001213b.pdf> (expressing concern that "the consequences of someone being arrested through racial profiling can now include deportation and the separation of families," and recommending that local law enforcement agencies ensure "thorough training" to prevent racial profiling); Alex Kingsbury, *Immigration Checks on Criminals Could Increase Deportations*, U.S. News & World Report, Apr. 20, 2010 (citing a letter from a coalition of immigrants' rights organizations to House Speaker Nancy Pelosi stating that Secure Communities "creates an incentive for police to arrest people on pre-textual or minor crimes so that their immigration status can be checked" and that it "will likely lead to unlawful racial and ethnic profiling," and reporting that "federal authorities are currently investigating several claims that [ICE programs similar to Secure Communities] have led to instances of racial profiling"); Nat'l Immigr. Forum, Secure Communities Fact Sheet, *available at* http://www.immigrationforum.org/images/uploads/Secure_Communities.pdf (stating that "[a]lthough individuals are checked once they are in jail, it matters how they got into the jail in the first place. Police officers with a motive to deport undocumented immigrants—or who have a prejudice towards Latinos or other persons of color—will find a pretext to arrest a person, bring them into the jail, and check their fingerprints against the DHS databases in the hopes of turning them over to ICE").

E. ICE Has Not Revealed the Process by Which It Negotiates Participation in Secure Communities With States and Localities

44. As of February 2010, Secure Communities was operating in 118 jurisdictions¹⁹ in sixteen states.²⁰ ICE is currently coordinating with states and local jurisdictions to expand Secure Communities to every state by 2011 and to every jail and prison throughout the country by 2013.²¹

45. The Secure Communities Standard Operating Procedures states that ICE signs Memoranda of Agreement with State Identification Bureaus.²² ICE has not, however, clarified how these agreements are negotiated on the state or local level or who has the authority to enter into an agreement on behalf of a State Identification Bureau or other state or local entity. Further, in spite of the significant impact of Secure Communities, no information is available as to whether other state or local actors have the opportunity to participate in negotiations surrounding the adoption and implementation of the program, or whether a local correctional facility, agency, or jurisdiction may decline to participate in Secure Communities.

46. Just since the submission of Plaintiffs' Requests in February 2010, twenty-two previously undisclosed agreements became publicly available, some months after they

¹⁹ Although ICE has indicated that "high-risk" jurisdictions are its priority, no information is available regarding how these "high-risk" jurisdictions are identified. Secure Communities Fact Sheet, *supra* note 8.

²⁰ Dep't of Homeland Sec., Immigration and Customs Enforcement, Strategy to Accelerate and Expand Secure Communities (Mar. 4, 2010), http://www.ice.gov/secure_communities/deployment/.

²¹ Press Release, Immigration and Customs Enforcement, Secretary Napolitano and ICE Assistant Secretary Morton Announce That the Secure Communities Initiative Identified More Than 111,000 Criminal Aliens in Its First Year (Nov. 12, 2009), http://www.dhs.gov/ynews/releases/pr_1258044387591.shtm.

²² ICE Standard Operating Procedures, *supra* note 6, at 3.

were signed.²³ The rate at which new agreements are being signed underscores the urgency of Plaintiffs' Requests and the public's need for meaningful information about Secure Communities.

47. The public needs information about the mechanisms for the program's implementation in order to hold local officials accountable for their decisions to participate in federal civil immigration enforcement. Past negative experiences with ICE programs involving local law enforcement and corrections agencies reinforce the great need for comprehensive public information about Secure Communities.

II. Secure Communities Constitutes A Substantial Expansion of Smaller-Scale Jail-Based Enforcement Programs Denounced as Flawed and Secretive

48. The Criminal Alien Program ("CAP") and 287(g) are smaller-scale ICE jail-based screening programs preceding, and similar, in some ways, to Secure Communities. The government's own investigations revealed that ICE consistently attempted to conceal fundamental flaws of these Secure Communities precursors by failing to affirmatively collect and disclose critical data and by providing misleading information.²⁴

49. CAP involves personnel at participating jails notifying federal immigration enforcement agents about foreign-born inmates. Federal immigration agents then may

²³ Dep't of Homeland Sec., Immigration and Customs Enforcement, FOIA Reading Room (last modified Apr. 15, 2010), <http://www.ice.gov/foia/readingroom.htm>.

²⁴ See e.g., U.S. Gov't Accountability Office, GAO-09-109, Immigration Enforcement: Better Controls Needed over Program Authorizing State and Local Enforcement of Federal Immigration Laws 23-24 (Jan. 2009), *available at* <http://www.gao.gov/products/GAO-09-109> (concluding that ICE has failed to institute sufficient oversight, data collection practices, or clear objectives in implementing the 287(g) program); Dep't of Homeland Sec., OIG-10-13, *supra* note 13, at 35-37 (documenting ICE's systematic failure to manage 287(g) in accordance with prioritization objectives, issue accurate information about the program, or address serious civil liberties concerns).

choose to conduct interviews with these individuals in an attempt to ascertain immigration status and target individuals for detention and removal.²⁵

50. The 287(g) program cross-designates corrections and law enforcement officers in participating states and local jurisdictions to enforce federal immigration law.²⁶ Through 287(g), local law enforcement officers are deputized to conduct the jail-house interviews generally performed by federal immigration agents as part of CAP.

51. Like Secure Communities, CAP and 287(g) purport to target individuals held in state and local jails for detention and removal.²⁷ Neither CAP nor 287(g), however, operate nationwide,²⁸ while DHS envisions implementation of Secure Communities in every jail and prison in the country.

²⁵ Immigration Policy Center, The Criminal Alien Program: Immigration Enforcement in Travis County, Texas 4-5 (Feb. 2010), *available at* http://www.immigrationpolicy.org/sites/default/files/docs/Criminal_Alien_Program_021710.pdf.

²⁶ See Dep't of Homeland Sec., Immigration and Customs Enforcement, Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act: The ICE 287(g) Program, http://www.ice.gov/pi/news/factsheets/section287_g.htm (last visited Apr. 23, 2010).

²⁷ Dep't of Homeland Sec., Immigration and Customs Enforcement, Criminal Alien Program, <http://www.ice.gov/partners/dro/cap.htm> (last visited Apr. 23, 2010).

²⁸ CAP currently operates in approximately ten percent of the 3,100 local jails and prisons across the country. Trevor Gardner II & Aarti Kohli, Chief Justice Earl Warren Institute on Race, Ethnicity & Diversity, UC Berkeley Law School, The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program 2 n. 6 (Sept. 2009) (citing ICE, "ICE Access: State/Local Coordination," www.ice.gov/partners/dro/iceaccess.htm (as viewed on July 24, 2009)), *available at* http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf. Although 287(g) was authorized by statute in 1996, it was not implemented in any local jurisdiction until 2001, and was implemented in only three jurisdictions prior to 2007. Migration Policy Institute, A Program in Flux: New Priorities and Implementation Challenges for 287(g) 6 (citing ICE data), *available at* <http://www.migrationpolicy.org/pubs/287g-March2010.pdf>. Currently, 287(g) operates in jails through "Jail Enforcement Operations" agreements with approximately forty counties and municipalities and five state corrections agencies. ICE, Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act (Aug. 18, 2008), http://www.ice.gov/partners/287g/Section287_g.htm.

52. The eventual release of some information has been instrumental in the ability of major law enforcement organizations, experts, and the public to evaluate the wisdom and effectiveness of local involvement in immigration enforcement. Public scrutiny has confirmed widely-held concerns about the programs, including their ineffectiveness, disregard for core civil liberties, adverse affect on public trust and confidence in law enforcement, and unduly high costs to local communities. According to Montgomery County, Maryland Police Chief J. Thomas Manger, “[i]mmigration enforcement by local police would negatively affect and undermine the level of trust and cooperation between local police and immigrant communities,” and “would be a burden that most major police agencies would not be able to bear.”²⁹ Other jurisdictions have similarly concluded that the costs of participating in local enforcement programs far outweigh the benefits.³⁰ In Salt Lake City, Utah, Mayor Ralph Becker and Police Chief Chris Burbank opted not to participate in 287(g), citing concerns that it would “add a tremendous burden on our

²⁹ *Examining 287(g): The Role of State and Local Law Enforcement in Immigration Law: Hearing Before the House Comm. on Homeland Security*, 11th Cong. 3-5 (2009) (statement of Chief J. Thomas Manger, Montgomery County Police Dep’t, Chairman, Legislative Comm. for the Major Cities Chiefs Ass’n), *available at* <http://hsc.house.gov/SiteDocuments/20090304140934-99719.pdf>; *see also* Letter from Mariaelena Hincapie, Executive Dir., Nat’l Immigr. L. Ctr., to President Barack Obama (Aug. 25, 2009) (calling for the repeal of 287(g) in light of, *inter alia*, the GAO report, DOJ civil rights investigation, and OIG audit, on behalf of more than 500 organizations), *available at* <http://www.nilc.org/immlawpolicy/LocalLaw/287g-Letter-2009-08-25.pdf>; Immigration Policy Center, *supra*, note 25, at 1 (“find[ing] strong evidence to support claims that Irving police engaged in racial profiling of Hispanics” in carrying out its CAP initiative).

³⁰ *See* Police Foundation, *The Role of Local Police: Striking a Balance Between Immigration Enforcement and Civil Liberties* (Apr. 2009) (concluding after a comprehensive review that the costs of local participation in 287(g) outweigh the benefits); Editorial, *Too Broken to Fix*, *NY Times*, at A28 (Apr. 9, 2010) (calling for the abandonment of 287(g)’s local, jail-based model of immigration enforcement).

police, who are not trained to enforce federal policy” and “deter victims and witnesses from reporting violent and other serious crimes.”³¹

53. Secure Communities raises many of the same concerns. Because Secure Communities uses the same jail-based screening methods as CAP and 287(g), it too risks sweeping U.S. citizens and non-criminal immigrants into detention, increasing illegal racial profiling by law enforcement officers, undermining local law enforcement-community relations, and resulting in the misallocation of local resources. Accordingly, agencies weighing the costs and benefits of participating in Secure Communities need immediate access to meaningful information and analysis that addresses these dangers. The present FOIA action is an essential means for securing the disclosure of precisely this information and its dissemination to the public.

54. Increased scrutiny has led to grave doubts among the public, the law enforcement community, and government oversight agencies about the utility of precursor programs to Secure Communities like CAP and 287(g).³² Nevertheless, Secure Communities seems to adopt and expand the flawed principles and procedures behind these programs, with even less transparency and oversight.

³¹ Sheena McFarland, *Minutemen Protest SLC Opting Out of Immigration Enforcement*, Salt Lake Trib. (Apr. 9, 2009), available at http://www.sltrib.com/news/ci_12548933.

³² The recent passage of the Arizona immigration criminalization law raises similar concerns about the negative impact that state and local enforcement of immigration law will have on public safety and civil liberties. See Randal C. Archibald, *Arizona's Effort to Bolster Local Immigration Authority Divides Law Enforcement*, N.Y. Times, Apr. 22, 2010, at A16 (reporting that "a national police group condemned [the law] as likely to lead to racial and ethnic profiling and to threaten public safety if immigrants did not report crime or did not cooperate with the authorities out of fear of being deported").

III. The Need to Evaluate the Costs and Benefits of Secure Communities Demands Immediate Disclosure of the Records Requested by Plaintiffs

55. ICE's strategy of implementing Secure Communities in the absence of meaningful disclosure to, or input from, the public and local entities flies in the face of the President's directive that agency initiatives be carried out in a transparent and responsive manner,³³ formal recommendations from executive review bodies that ICE release accurate information and track essential data regarding its enforcement initiatives,³⁴ and the insistence of leading police chiefs that they and their colleagues "should be consulted and brought in at the beginning of any process to develop a national initiative to involve local police agencies in the enforcement of federal immigration laws."³⁵

56. Comprehensive information regarding Secure Communities is essential for taxpayers, voters, and other members of the public to make informed decisions regarding the costs and benefits of the initiative.

57. Law enforcement officials and community members have the right to information about the consequences of Secure Communities on local policing, public safety, and civil liberties.

58. Secure Communities is much too far-reaching and significant a government operation to be introduced without meaningful public disclosure and scrutiny.

³³ See President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies on Transparency and Open Government, 74 Fed. Reg. 15, 4685 (Jan. 26, 2009).

³⁴ See U.S. Gov't Accountability Office, *supra* note 24, at 23-24; Dep't of Justice, Office of Inspector General, OIG 10-63, The Performance of 287(g) Agreements (Mar. 2010), available at www.justice.gov/oig/reports/INS/e0304/final.pdf.

³⁵ Major City Chiefs, Immigration Committee, Recommendations for Enforcement of Immigration Laws by Local Police Agencies 9 (June 2006).

59. Accordingly, Plaintiffs' Requests and the present action are necessary in order to vindicate the public's right to be informed of its government's operations, and to correct Defendants' refusal to implement Secure Communities in an open, transparent, and responsive manner.

IV. Plaintiffs' FOIA Requests to Defendants

60. On February 3, 2010, Plaintiffs' sent Requests pursuant to FOIA, 5 U.S.C. § 552, *et seq.*, to Defendants via overnight mail.

61. Plaintiffs' Requests seek records related to or containing: Policies, Procedures or Objectives of Secure Communities (including overview documents, state and local agreements, Secure Communities inquiry and response procedures, state training or explanatory materials developed by ICE, documents describing the relationship between Secure Communities and other ICE enforcement programs, and racial profiling policy and oversight documents); Data or Statistical Information (including the number of immigration detainees and removals both before and since the implementation of Secure Communities, the number of United States citizens erroneously identified through Secure Communities, and demographic information for individuals identified through Secure Communities); Immigration and Demographic Information and Records of individuals subject to Secure Communities queries or ICE detainees; Evidence of the Fiscal Impact of Secure Communities (including documentation analyzing the cost of Secure Communities to State and Local Jurisdictions or the Federal Government, Intergovernmental Service Agreements, and contracts with private entities); Communications Records (including public statements and speeches related to Secure Communities and the Secure Communities public relations strategy); Program

Assessments of Secure Communities; and Secure Communities Complaint Mechanisms or Oversight Documents.

62. Plaintiffs' Requests sought expedited processing under 5 U.S.C. § 552(a)(6)(E)(i)(I), citing a "compelling need" for the information because ICE is actively negotiating and planning for a nationwide expansion of Secure Communities, as stated in paragraphs 44-47.

63. Plaintiffs' Requests also sought a waiver of applicable fees under 5 U.S.C. § 552(a)(4)(A) and 8 C.F.R. § 5.11(k).

V. Agency Responses

64. No Defendant timely responded to the substance of Plaintiffs' Requests.

65. Plaintiffs confirmed delivery of their Request to ICE on February 4, 2010, but ICE did not acknowledge receiving Plaintiffs' Request until February 19, 2010. ICE denied Plaintiffs' fee waiver and expedite requests in a letter dated February 23, 2010 and received by Plaintiffs on March 9, 2010. Plaintiffs appealed this denial on March 15, 2010, and ICE has not issued a decision on the appeal. ICE has issued no substantive response to the request.

66. Plaintiffs have constructively exhausted administrative remedies against ICE.

67. Plaintiffs confirmed delivery of their Request to DHS on February 4, 2010, but DHS did not acknowledge receiving Plaintiffs' Request until February 12, 2010. DHS denied Plaintiffs' fee waiver and expedite requests in a letter dated March 5, 2010 and received by Plaintiffs on March 9, 2010. Plaintiffs appealed this denial on March 15, 2010 and DHS has not issued a decision on the appeal. DHS has issued no substantive response to the request.

68. Plaintiffs have constructively exhausted administrative remedies against DHS.

69. Plaintiffs confirmed delivery of their Request to EOIR on February 4, 2010, but EOIR did not acknowledge receiving Plaintiffs' Request until February 19, 2010.

Plaintiffs have received no further information from EOIR.

70. Plaintiffs have constructively exhausted administrative remedies against EOIR.

71. Plaintiffs confirmed delivery of their Request to the FBI, and the FBI acknowledged receiving Plaintiff's Request, on February 4, 2010. The FBI granted Plaintiffs expedited processing in a letter dated March 2, 2010. The FBI denied Plaintiffs' fee waiver request in a letter dated March 9, 2010. Plaintiffs appealed the fee waiver denial on March 15, 2010. Plaintiffs confirmed delivery of the appeal to the FBI on March 16, 2010. The FBI acknowledged receipt of the fee waiver appeal in a letter dated April 2, 2010. The FBI has not issued a decision on this appeal. The FBI has issued no substantive response to the request.

72. Plaintiffs have constructively exhausted administrative remedies against the FBI.

73. Plaintiffs confirmed delivery of their Request to OLC on February 4, 2010. OLC acknowledged receiving Plaintiffs' Request in a letter dated April 16, 2010. OLC also denied Plaintiffs' expedite request in the letter dated April 16, 2010. Plaintiffs appealed the denial of expedited processing on April 21, 2010, and OLC has not issued a decision on the appeal. OLC has issued no substantive response to the request.

74. Plaintiffs have constructively exhausted administrative remedies against OLC.

75. The statutory time limit for the agencies' compliance pursuant to FOIA, 5 U.S.C. § 552(a)(6)(A), is twenty days from the date on which the Defendants received Plaintiffs' Requests.

76. The failure of Defendants to respond substantively to Plaintiffs' Requests within the statutorily prescribed period results in constructive exhaustion of Plaintiffs' administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C).

77. Requests for expedited processing do not need to be administratively exhausted. 5 U.S.C. § 552(a)(6)(E)(iii); *Elec. Privacy Info. Ctr. v. Dep't of Defense*, 355 F. Supp. 2d 98, 100 n.1 (D.D.C. 2004).

78. Plaintiffs have, however, exhausted administrative remedies for the denials of fee waiver and expedite requests by filing timely administrative appeals. 5 U.S.C. § 552(a)(6)(E)(iii); 5 U.S.C. 552(a)(4)(A)(viii). The agencies' failure to respond to these appeals in a timely manner under 5 U.S.C. § 552(a)(6)(ii) results in constructive exhaustion of Plaintiffs' administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C).

79. Plaintiffs have a statutory right to the records they seek and there is no legal basis for Defendants' failure to disclose them in full.

80. Defendants' withholding of records is unlawful both in refusing to release documents and in causing unreasonable delay in the time it takes Plaintiffs to receive documents.

FIRST CLAIM FOR RELIEF

Violation of FOIA for Failure to Disclose and Release Records Responsive to Plaintiffs' Requests

81. Plaintiffs repeat and re-allege each and every allegation contained in paragraphs 1 through 80 as if repeated and incorporated herein.

82. By failing to disclose and release the requested records, Defendants have violated the public's right, advanced by the Plaintiffs, to agency records under 5 U.S.C. § 552.

SECOND CLAIM FOR RELIEF

Defendants Improperly Denied Plaintiffs' Requests for Expedited Processing

83. Plaintiffs repeat and re-allege each and every allegation contained in paragraphs 1 through 82 as if repeated and incorporated herein.

84. Defendants have violated Plaintiffs' rights to expedited processing under 5 U.S.C. § 552(a)(6)(E) and Defendants' own regulations, 6 C.F.R. § 5.5(d) (DHS); and 28 C.F.R. § 16.5 (DOJ).

THIRD CLAIM FOR RELIEF

Defendants Improperly Denied Plaintiffs' Requests for a Fee Waiver

85. Plaintiffs repeat and re-allege each and every allegation contained in paragraphs 1 through 84 as if repeated and incorporated herein.

86. Defendants have violated Plaintiffs' rights to a fee waiver under 5 U.S.C. § 552(a)(4)(A)(iii) and Defendants' own regulations 6 C.F.R. § 5.11(k) (DHS) and 28 C.F.R. § 16.11(k) (DOJ).

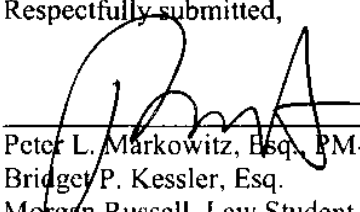
PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

- 1) Order Defendants immediately to make a full, adequate, and expedited search for the requested records;
- 2) Order Defendants to engage in expedited processing in this action;
- 3) Enjoin Defendants from assessing fees or costs for the processing of the FOIA Request;
- 4) Order Defendants, upon completion of expedited processing, to disclose the requested records in their entirety and make copies available to Plaintiffs no later than ten days after the Court's order;
- 5) Award Plaintiffs their costs and reasonable attorney's fees incurred in this action as provided by 5 U.S.C. § 552(a)(4)(E); and
- 6) Grant such other and further relief as this Court may deem just and proper.

Respectfully submitted,

Date: April 27, 2010
New York, New York


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Attorneys for Plaintiffs

From:	Sandweg, John </O=DHS ORG/OU=E2K3 ADMIN GROUP/CN=RECIPIENTS/CN=JOHN.SANDWEG>
To:	"Bametzrieder, Lori </O=DHS ORG/OU=E2K3 ADMIN GROUP/CN=RECIPIENTS/CN=LORI.BAMETZRIEDER>"
CC:	"Perry, Nicholas </O=DHS ORG/OU=E2K3 ADMIN GROUP/CN=RECIPIENTS/CN=NICHOLAS.PERRY>"; "Baroukh, Nader </O=DHS ORG/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=NADER.BAROUKH>"
Subject:	RE: USOAS letter for A/General Counsel Martin
Date:	2009/03/16 19:07:39
Priority:	Normal
Type:	Note

Lori, Nicholas and Nader-

FYI:

As you may know, David has asked Dora Schriro to testify at this hearing. He would like Dora to provide something similar to her recent House testimony.

ICE will be tasked with preparing the written testimony, but we should be ready to conduct a quick review of their work product as we will have very little time to turn it around.

JS

John R. Sandweg

Chief of Staff

Office of the General Counsel

(b)(6)

From: Grant, Daniel
Sent: Monday, March 16, 2009 9:34 AM
To: Sandweg, John
Subject: FW: USOAS letter for A/General Counsel Martin

FYI. I have printed the material for Mr. Martin, any thoughts?

Dan Grant

Office of the General Counsel

Department of Homeland Security

(b)(6)



From: Perry, Nicholas
Sent: Monday, March 16, 2009 9:14 AM
To: Grant, Daniel
Cc: Bametzrieder, Lori; Baroukh, Nader
Subject: RE: USOAS letter for A/General Counsel Martin

Dan,

Here is a summary prepared by Lori Bametzrieder of my team of that meeting to which David is invited, the Thematic Hearing on U.S. Immigrant and Deportation Policies.

We have serious concerns about DHS attending this meeting. Specifically, the tone of the invitation calls into question how objective the hearing will be in considering DHS' views.

ICE was also invited but it was still undecided last week if ICE will attend.

The Department of State will be at hearing representing DHS and is encouraging DHS to send a representative.

At minimum, Dora Schriro, the Special Advisor to the Secretary on ICE and Detention should be aware of the meeting. I believe ICE was going to be informing her of it.

Here is the summary of the meeting:

The hearing is scheduled to be held on March 20, 2009 by the Inter-American Commission on Human Rights (IACHR), Organization of American States (OAS) on Immigrant Detention and Deportation Policies in the United States. Following this email please find another email which contains a PDF copy of the letter from the OAS requesting the presence of a United States government official to speak to these issues. The request for the hearing was made to the OAS by University of Pennsylvania Law School, and the Immigration Clinic at the University of Texas School of Law, ("the petitioners"). Presumably, representatives for the petitioners will be present at the hearing. Also at the hearing, will be Commissioners from the OAS. Andrew Stevenson, a U.S. alternate representative to the OAS, and Nina Schou, the Department of State (DOS), Legal Division, have requested participation by ICE and/or DHS OGC at the hearing. It is my understanding that at the hearing, the petitioners will present information on areas such as due process rights for detainees, and detention of children, and are looking to receive updates from the U.S. government on these issues.

According to their letter requesting a hearing on these issues, the U.S.' immigration enforcement policies are referred to having "a tragic impact on both immigrants and citizens." The letter also references that the United States government has "hindered" independent investigations by the OAS by placing "restrictions" on access to detentions facilities. The letter states that the petitioners intend to present updated information about the "manner in which workplace and home raids are executed; separation of children from their mother who are taken into custody often without warning; mandatory detention and expedited removal; local enforcement of federal immigration laws; stipulated orders of removal; and prolonged and indefinite detention," which were all apparently addressed at another hearing in October 2008. (I am uncertain as to whether the U.S. government had a representative present at that hearing.) The letter also indicates that they will be presenting information on the Attorney General's recent decision in *Matter of Compean*, 24 I & N Dec. 710 (A.G. 2009)(dealing with motions to reopen based on ineffective assistance of counsel).

It is my understanding that the Commissioners can ask questions of the parties at this hearing, but I am uncertain of the extent of their participation.

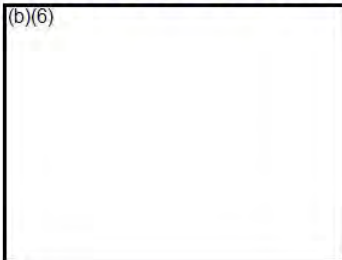
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Nicholas J. Perry

Acting Assistant General Counsel for Immigration Enforcement

U.S. Department of Homeland Security

Office of the General Counsel



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From: Bametzrieder, Lori
Sent: Thursday, March 12, 2009 12:26 PM
To: Perry, Nicholas
Subject: Fw: USOAS letter for A/General Counsel Martin
Importance: High

FYI

From: Overby, Michael W
To: Bametzrieder, Lori A
Cc: Grant, Daniel ; Dorsey, Sarah B; Strait, Andrew R; Stevenson, Andrew D
Sent: Thu Mar 12 12:16:55 2009
Subject: FW: USOAS letter for A/General Counsel Martin

Also looping in Lori Bametzrieder in DHS/General Counsel, who has been following this issue.
Thanks!

Michael W. Overby
Political Section

U.S. Permanent Mission to the Organization of American States
Bureau of Western Hemisphere Affairs
U.S. Department of State

(b)(6)

From: Overby, Michael W
Sent: Thursday, March 12, 2009 11:49 AM
To: 'Daniel, Grant' (b)(6)
Cc: 'Andrew, Strait' (b)(6); 'sarah.dorsey' (b)(6); Stevenson, Andrew D
Subject: USOAS letter for A/General Counsel Martin
Importance: High

Hi Daniel,

For the attention of Acting General Counsel Martin, please find attached a letter regarding the upcoming 134th Session of Hearings of the Inter-American Commission on Human Rights, addressed to ICE Acting Assistant Secretary John Torres. We will be faxing this directly to AA/S Torres' office shortly but wanted to ensure you received a copy.

Also copying Andrew Strait and Sarah Dorsey at DHS, who are aware of these proceedings, and Andrew Stevenson in USOAS, who coordinates USG participation with this human rights body at OAS.

Thank you!

Mike

<<2009-03-11 Letter ICE - invitation to IACHR hearings.PDF>> <<2009-02-20 Hearing Request - US Immigration Detention Policy.pdf>>

Michael W. Overby
Political Section
U.S. Permanent Mission to the Organization of American States
Bureau of Western Hemisphere Affairs
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Subject:	RE: USOAS letter for A/General Counsel Martin
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Priority:	Normal
Type:	Note

Thank you, I have printed the materials and your e-mails for Mr. Martin's review and have forwarded the info on to John Sandweg.

Please let me know if you hear anything else or have any more information

Dan Grant

Office of the General Counsel

Department of Homeland Security

[daniel.grant](mailto:daniel.grant@ice.dhs.gov) (b)(6)

(b)(6)

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Nicholas J. Perry

Acting Assistant General Counsel for Immigration Enforcement

U.S. Department of Homeland Security

Office of the General Counsel

(b)(6)

[Nicholas.Perry](#)

(b)(6)

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Thanks!

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Mike

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Sent Date:	2009/03/16 09:36:55

Generator: Microsoft Word 11 (filtered medium)

February 23, 2009

Janet Napolitano
Secretary of Homeland Security
Office of the Secretary, Department of Homeland Security
Washington, D.C. 20528

Dear Secretary Napolitano:

We write to thank you for your recent directive requesting information from components within the Department of Homeland Security (DHS) regarding several key programs related to immigration enforcement, border security and benefits adjudication. The undersigned organizations welcome your attention to the important issues identified in your directive, your intention to evaluate the success of each program, and your willingness to consider suggestions for reform or restructuring where needed. We appreciate your statement in the directive recognizing that America is a nation of immigrants and agree that it is the Department's responsibility to manage the borders in a way that furthers this heritage, promoting legal immigration and commerce while protecting the nation and upholding the rule of law.

The undersigned organizations represent an informal coalition of legal aid providers, immigrant and refugee rights organizations, research institutions, legal experts, and other non-governmental associations from across the nation who contributed to the recommendations contained in the attached report that was developed in response to your directive. We believe that addressing these issues and implementing cost-effective reforms early in the new Administration will further the fair and efficient functioning of our immigration system and build support for more systemic reforms.

We urge you to consider the following key priorities as part of your review:

- Prosecutorial Discretion: We welcomed comments you made during your Senate confirmation hearing indicating your intention to focus on immigration enforcement programs that target serious criminal activity and egregious employer fraud rather than relying upon indiscriminate sweeps and collateral arrests. The Department should issue memoranda that renew DHS's commitment to the broad use of prosecutorial discretion. Such memoranda should favor the use of effective, targeted enforcement that ensures due process rights are respected, hard-working individuals are not swept up in overly zealous enforcement actions, and legal immigration is facilitated and encouraged.
- Interior Enforcement: We support your stated goal to focus enforcement efforts on egregious employers, traffickers, smugglers and those who have committed serious crimes. However, we are very concerned that programs such as Secure Communities, ICE ACCESS, INA 287(g), Fugitive Operations and large-scale worksite enforcement actions have too often diverged from that goal. These programs have frequently become tools for netting as many undocumented individuals as possible, sometimes through the use of racial profiling, without regard for the seriousness of any one individual's offense, the person's relationship to the community, and potential for immigration relief or other equities. Transformed from highly targeted initiatives into blunt enforcement instruments, these programs have mistakenly swept up vulnerable populations, U.S. citizens and other lawfully present individuals into their wide net.

The new administration must take back the reins of immigration enforcement, clarify the role of state and local agencies in enforcement activities, review existing INA 287(g) agreements with state and local law enforcement, and evaluate the impact of continuing such measures. DHS should terminate any specific programs that cannot ensure protection of appropriate due process rights. We also ask that you review current oversight mechanisms to guarantee these protections are meaningful.

- Detention: To avoid wasteful spending, preempt costly litigation, and guarantee community safety, detention should be used only when necessary and in the least restrictive setting required to ensure community safety. Vulnerable populations such as asylum seekers, crime victims, families, children, single parents, pregnant women, and the seriously ill should not be detained. DHS should create a continuum of options open to all individuals that utilize different types of alternatives and release programs based upon an individualized case assessment. To ensure detainees are treated humanely, the Department should codify improved detention standards through notice and comment rulemaking.
- Border: Our nation's border strategy, including the construction of fences on the Southern border and the use of the National Guard, should be revisited with input and collaboration from border communities, environmental groups and other stakeholders.
- E-Verify and SSA No Match: The Administration should halt any major expansion of the existing E-Verify program until it undertakes a comprehensive analysis of current and potential problems, and it should consider a number of important modifications to ensure that the program accomplishes its goals. In the absence of comprehensive immigration reform, any plan to make E-Verify mandatory, or to implement the currently enjoined SSA no-match regulation, will result in severe economic destabilization and dislocation to the community.
- Naturalization, Family, Employment-Based and Nonimmigrant Administrative Backlogs: We are grateful that you have identified a number of areas of concern with respect to backlogs in the processing of applications for immigration benefits. USCIS should be given the resources necessary to ensure family, naturalization and other applications are processed in a timely and effective manner and effectively track and quantify pending petitions.

We stand ready and willing to work with you to reform our nation's immigration system. We would be pleased to provide additional information or recommendations regarding current programs and operations of the Department. We hope to continue this dialogue with you and your staff as you review current programs and evaluate possible reforms. We believe the DHS/NGO Enforcement Working Group and other liaison relationships with DHS are important avenues to enhance collaboration between the Department and communities across the country and we look forward to working with you through these mechanisms. Thank you for your consideration.

National Organizations:

The Advocates for Human Rights
American-Arab Anti-Discrimination Committee
American Civil Liberties Union
American Immigration Law Foundation
America's Voice
American Immigration Lawyers Association

Arab American Institute
Asian American Justice Center
Breakthrough: building human rights culture
Center for National Security Studies
Church World Service, Immigration and Refugee Program
Coalition for Humane Immigrant Rights of Los Angeles
The Episcopal Church
The Fair Immigration Reform Movement, a project of the Center for Community Change
Friends Committee on National Legislation
Hebrew Immigrant Aid Society
Immigration Equality
Immigrant Legal Resource Center
Immigration Policy Center
Lutheran Immigration and Refugee Service
Mexican American Legal Defense and Educational Fund
National Council of La Raza
National Immigration Forum
National Immigration Law Center
National Immigrant Justice Center
National Immigration Project of the National Lawyers Guild
National Korean American Service & Education Consortium
National Network for Arab American Communities
OCA – Embracing the Hopes and Aspirations of Asian Pacific Americans
Prison Legal News
Rights Working Group
Service Employees International Union
Sisters of Mercy of the Americas
South Asian Americans Leading Together
UNITE HERE International Union
Women’s Refugee Commission

Regional, State and Local Organizations:

American Gateways, Austin, Texas
Asian Pacific American Community Support and Service Association, Portland, Oregon
Border Action Network, Tucson, Arizona
Border Network for Human Rights, El Paso, Texas/ Southern New Mexico
CASA de Maryland, Inc.
Capital Area Immigrants’ Rights Coalition.
Centro Mujeres de la Esperanza, El Paso, Texas
Colorado Immigrant Rights Coalition
Florida Immigrant Advocacy Center, Miami, Florida
Hudson Perinatal Consortium, Inc., Jersey City, New Jersey
Idaho Community Action Network
Illinois Coalition for Immigrant and Refugee Rights, Chicago Illinois
Make the Road, New York
Massachusetts Immigrant and Refugee Advocacy Coalition
Michigan Organizing Project, Kalamazoo, Michigan
Nebraska Appleseed Center for Law in the Public Interest, Lincoln, Nebraska

New Jersey Immigration Policy Network
New York Immigration Coalition
Northwest Federation of Community Organizations
OneAmerica, Seattle, Washington
Political Asylum/Immigration Representation Project, Boston, Massachusetts
Public Counsel, Los Angeles, California
The Riverside Church Sojourners Immigration Detention Visitor Project, New York
Rocky Mountain Immigrant Advocacy Network
Rocky Mountain Survivors Center, Denver, Colorado
Tennessee Immigrant & Refugee Rights Coalition

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I. Interior Enforcement: Promoting Due Process

Smart enforcement requires smart priorities. Over the last few years, DHS resources have been diverted from the core mission of keeping America safe to the easier and, at times, counterproductive mission of seeking to deport any non-citizen who is subject to removal under the law. ICE's goal has been to maximize the number of people who are detained and deported. An exclusive focus on deporting all removable non-citizens has resulted in ICE devoting resources to individuals who should not be a priority. These include long-time lawful permanent residents with old convictions; veterans of the armed services and their family members; family members of citizens and long time residents; non-citizen children who would be eligible for relief under the DREAM Act; and victims of torture and abuse who are eligible for asylum and other forms of relief under domestic and international law.

The approach taken by ICE in recent years resulted in higher costs for litigation, detention, and physical deportation, as well as severe costs to families and communities. Enforcement decisions have enormous budgetary implications. These include detention costs, transfer costs, litigation costs at the agency and in the courts, and payments for damage actions where persons are improperly placed in removal proceedings.

DHS officers make (or sometimes fail to make) decisions with vast budgetary implications. These include:

- Deciding whether to place a person in removal proceedings.
- Evaluating whether a person is eligible for bond or parole.
- Setting high bonds that individuals cannot pay, and that therefore increase detention costs to the government.
- Evaluating whether to pursue an appeal when an individual has relief available.

These costs have increased as ICE broadly interpreted the scope of mandatory detention and expended its mechanisms for identifying potentially removable non-citizens.

ICE should prioritize its enforcement goals so that a focus on volume does not outstrip the resources required to enforce the law in a fair and humane manner. As described in greater detail below, the Department should develop a strategic plan that employs a proportional and fair approach to enforcement and protects basic due process rights. The agency's current enforcement strategies should be reviewed and revised to restore integrity to our system, ensure basic rights are respected, and promote transparency and accountability to the public. To truly promote economic and community security, the Administration should redirect resources to focus strategically on serious enforcement concerns such as egregious labor law violations or criminal syndicates rather than minor civil or criminal offenses.

Smart enforcement would put in place procedures to assure that government money is not wasted on enforcement actions that are counterproductive. Smart priorities would:

- Evaluate a person's record and equities before seeking removal and exercise discretion as appropriate.
- Recognize that it is not in the interest of the United States to seek the broadest interpretation of removal authority in every case. Equities, such as effects on family and community, and other considerations, such as costs to the government, should also be considered.
- Create and/or reinstate special review procedures prior to undertaking the expense of detention and removal for certain cases, especially for special categories of non-citizens such as veterans of the armed forces or asylum seekers.

The recommendations below regarding interior enforcement would reduce the cost to the government and taxpayers by ensuring that enforcement operations are targeted at serious criminal enterprise such as trafficking or egregious employers. If DHS returns to the use of prosecutorial discretion in enforcement operations, DHS operations will be more cost-saving, effective and humane.

A. The Use of Prosecutorial Discretion in Enforcement Actions

The use of prosecutorial discretion would ensure that individuals who have strong equities and do not pose a risk to the community are not harmed unnecessarily by prolonged detention or removal. In recent years, DHS has often detained individuals who have strong equities and could be released on alternatives or parole.

For example, Maria, an indigenous Central American woman who is a victim of domestic violence, was turned over to ICE by local police in Broward County, Florida after a traffic stop.¹ Her one- and three-year-old U.S. citizen daughters were placed in foster care. A legal service provider obtained a certification from law enforcement in support of a U-visa regarding Maria's abuse. Yet Maria was detained and her children remained in foster care until the family court judge finally ordered her reunited with her children in July 2008. This example illustrates the case of an individual who had no criminal background, was a victim of violence, and is a sole caregiver. She is a clear candidate for the use of prosecutorial discretion, which in this case would have promoted family unity, saved taxpayer dollars and reserved enforcement resources for more appropriate law enforcement targets.

ICE has focused on statistics, seeking to increase the number of removals instead of prioritizing individual cases based on levels of danger to the community or other factors. For example, with increased Border Patrol on the northern border, Customs and Border Patrol (CBP) routinely question passengers on trains that run from Chicago to New York. These operations appear to be rooted in the quest for higher statistics, not at securing the border or searching for specific targets who pose a threat to national security.

ICE officers who screen arrestees at local jails (or who visit probation and parole offices) appear to be engaged solely in searching for those may be removable. Such fishing expeditions do not serve the national security goals of the agency. They also raise a number of serious due process considerations. For example, non-citizens who are arrested, but for whom charges are dismissed, are nonetheless subjected to ICE detainers. Similarly, ICE has detained individuals who have pending applications for

¹ Correspondence from the Women's Refugee Commission, February 2009.

T or U visas (for trafficking or crime victims, respectively) even where any associates criminal charges have been dismissed against the individuals.

DHS has traditionally assumed that any non-citizen with a criminal conviction is an appropriate priority for enforcement. However, this assumption ignores the fact that many individuals labeled as ‘criminal aliens’ do not pose a threat to the community. There is no statute of limitations within immigration law. As a result, individuals may be ‘removable’ even if the conviction occurred many years in the past and they have decades of unblemished subsequent history.

In addition to using enforcement resources more judiciously, ICE must ensure that individuals are afforded full due process protections so that U.S. citizens and other individuals who are lawfully present are not mistakenly removed from the United States. A number of recent news stories detailed cases of U.S. citizens or lawful permanent residents who were mistakenly deported or detained. The Florence Immigrant and Refugee Rights Project testified before Congress that it sees an average of 25 individuals in immigration detention per month with potentially meritorious claims to U.S. citizenship. Typically, 5-10 cases are terminated on US Citizenship grounds per month in the immigration courts at the Florence ICE Service Processing Center and Eloy CCA Detention Center combined.²

There appears to be no system in place to screen cases and ensure that a detainer (or a Notice to Appear) is *not* issued against a person who fits established categories for prosecutorial discretion. These categories should include persons who have served in the United States military, those who are eligible for permanent status through asylum, adjustment or other visa categories. In addition, ICE officers frequently place detainers, detain, or initiate removal proceedings against individuals who are U.S. citizens (often in cases where citizenship was derived automatically through citizen parents) or whose convictions do not, in fact, make them removable.

U.S. citizen Jose Ledesma was detained by ICE for two months in 2008 despite presenting government attorneys and a judge with a California birth certificate and baptismal certificates showing that he was born in the United States. In another example, on September 25, 2008, ICE detained U.S. citizen Guillermo Olivares Romero for two weeks, despite Mr. Romero presenting a U.S. birth certificate. He was only released after an ACLU attorney presented his birth certificate, school and vaccination records to immigration authorities.³

The recommendations below will ensure that enforcement resources are used wisely.

Recommendations:

- Reaffirm and expand upon the prosecutorial discretion guidance issued in a November 17, 2000 memorandum by former INS Commissioner Doris Meissner requiring immigration officers to exercise discretion in a judicious manner at all stages of the enforcement process. The guidance should require immigration officials to make use of available discretion for non-citizens with strong equities, humanitarian factors, or juvenile status.
- Refrain from automatically issuing a Notice to Appear in cases where an individual may have relief available or the individual is willing to accept an offer of voluntary departure from ICE.
- Encourage legally-justified, case-specific determinations for each appeal filed by ICE.

² Correspondence from Florence Immigrant and Refugee Rights Project, February 2009.

³ Anna Gorman, “Immigration Officials Held U.S. Citizen for Two Weeks,” L.A. Times, Oct. 28, 2008, available at <http://articles.latimes.com/2008/oct/28/local/me-deport28>.

- Adopt policy that avoids the use of immigration enforcement during and after a man-made or national disaster.
- End enforcement actions that lack a particularized focus on serious security threats and redirect enforcement resources to security threats. The Bush Administration used large-scale raids to demonstrate a crack-down on employers, yet the vast majority of individuals swept up in those raids were undocumented workers who committed no crimes other than working with false documentation. The new Administration should focus on apprehending serious security threats and punishing unscrupulous employers.
- Redirect resources away from prosecutorial initiatives that have failed to focus on serious criminal activity involving a security threat and that threaten to violate civil rights. The Administration should scale back or end Operation Streamline, a Bush Administration program that was implemented in 2005 that requires federal criminal charges be charged against every person who crosses the border illegally. Operation Streamline diverts resources away from targeting human trafficking, drug smuggling, and other major criminal activities, and hinders the efficient operation of courts by mandating the prosecution of minor offenses.

B. Access to Counsel

Under the immigration code, non-citizens who are placed in removal proceedings are entitled to obtain counsel at their own expense. However, an estimated 84% of all non-citizens are unable to access counsel due to a dearth of legal resources near their detention facility or local area; a lack of available pro bono assistance; and a lack of information about available resources, or other reasons. Since detainees may have relief available under the immigration law including asylum, Convention Against Torture relief, Violence Against Women Act relief, U visas, T visas, citizenship, lawful permanent residence, cancellation of removal or other forms of relief, it is imperative that the government promote access to counsel.

Recommendations:

- Adopt policy that requires all non-citizens in custody to be advised of their rights, including the right to obtain counsel. Immigration officials must promptly notify a non-citizen of the charges against him or her in a language that he or she can understand.
- Uphold a right to effective counsel in removal hearings consistent with the statute and the guarantee of a fundamentally fair proceeding under the Fifth Amendment.⁴
- Adopt policy guidance that permits immigration judges to appoint counsel for minors, any individual who claims that he is a United States citizen, mentally incompetent individuals, and individuals who were admitted as lawful permanent residents or refugees.
- Expand the legal orientation presentation program to all facilities.

C. Stipulated Removal Orders

DHS relies upon the use of stipulated orders of removal, in which a non-citizen admits his own deportability, to effectuate deportations. Yet stipulated orders do not provide a non-citizen with the same level of due process protection as one receives in a removal hearing. According to EOIR statistics and a report by the National Immigrant Justice Center, the number of immigrants in administrative detention who have signed deportation orders waiving their right to see a judge has dramatically increased.⁵ ICE's increasing reliance on stipulated orders of removal to effect

⁴ Many signatories to this report have urged Attorney General Holder to withdraw the opinion in *Matter of Compean*, 24 I&N Dec. 710 (A.G. 2009), that was issued by Attorney General Mukasey in January 2009.

deportations of detained immigrants raises concerns about whether these waivers are both knowing and voluntary. The spike in numbers also raises questions about the tactics used by ICE officers. The heavy use of stipulated orders threatens basic due process rights because the vast majority of non-citizens do not have counsel; may not understand the consequences of accepting the removal or the availability of immigration relief; and may not understand the interaction between any prior criminal offense and the availability of immigration relief.

Individuals who sign stipulated removals and forego removal proceedings may not have adequate opportunity to pursue relief, evaluate options for relief or consult with an attorney. For example, the National Immigrant Justice Center provided legal assistance to a Colombian woman who had unknowingly signed a stipulated order of removal indicating that she was deportable to Mexico. This woman did not understand and was too frightened to realize that she had agreed to be deported to a country that was not her own. She later realized the mistake and told an ICE officer, but was ignored until a NIJC attorney intervened to have the order rescinded. The attorney soon realized that the woman was afraid to return to Colombia and had an asylum claim, which she is pursuing. To ensure that individuals who have relief are able to pursue that relief in court, ICE should use stipulated orders very judiciously and ensure that individuals are fully apprised of their due process rights.

Issue Guidance Regarding the Use of Stipulated Orders: The Department of Homeland Security should reiterate its commitment to protecting the due process of all persons facing removal proceedings and instruct its agents and officers to ensure that justice is served whenever and wherever immigration laws are enforced.

Recommendations:

Guidance to the field is sorely needed and should clarify the following:

- Stipulated orders of removal should not be used for individuals who have not had the opportunity to consult with counsel. ICE should issue guidance clarifying that: 1) Immigrants should never be pressured or coerced to sign a stipulated order of removal and 2) ICE agents shall not attempt to encourage immigrants to sign a stipulated order of removal, e.g. through speculating about negative legal consequences or threatening that the non-citizen will face extended detention.
- ICE DRO and the Office of Chief Counsel must make all reasonable efforts to ensure that Immigration Judges have all of the relevant information about each case before signing off on the waiver of a hearing.
- Detained immigrants should be educated about their options, including any relief for which they might be eligible as well as the consequences of signing the order.
- Prior to signing a stipulated order of removal, all non-citizens must be provided with information in a language that he or she understands about the impact of accepting or accepting an order of removal.
- An immigrant presented with a stipulated order of removal must be informed, at a minimum, that he or she is waiving any claims to relief from removal and that reentering the United States following the acceptance of a removal order may result in criminal penalties.

⁵ “Language Barriers May Lead Immigrants to Waive Right to Hearing Before Deportation,” National Immigrant Justice Center, June 3, 2008, available at http://www.immigrantjustice.org/index.php?option=com_content&task=view&id=568&Itemid=12.

II. Interior Enforcement: Secure Communities, State and Local Enforcement including INA §287(g), Fugitive Operations, Large-Scale Enforcement Actions and the Institutional Removal Program

A. State and Local Enforcement: ICE ACCESS and INA §287(g)

Through the INA 287(g) program and other ICE ACCESS programs, the federal government has shifted its responsibility for enforcement of civil immigration laws to state and local police and other state and local agencies. It has — without meaningful oversight or review or statutory authority in many cases — encouraged immigration enforcement at the local level that has resulted in racial and ethnic profiling and the detention of U.S. citizens and permanent residents.

The basic problem is this: in INA §287(g) jurisdictions, state or local police with minimal training (or, in the case of a “jail model,” no training) in immigration law are put on the street with a mandate to arrest “illegal aliens.” Local officials often make it a high political and policy priority that these arrests take place. Meanwhile, the federal government has not provided meaningful oversight. The predictable and inevitable result is that *any* person who looks or sounds “foreign” is more likely to be stopped by police, and more likely to be arrested (rather than warned, or cited, or simply let go) when stopped. Moreover, any other abuses that police commit when exercising INA §287(g) authority are likely to go unreported and unpunished, given that many of the individuals they arrest are swiftly deported and have little access to counsel; that state or local officials may not exercise their ordinary oversight roles when their police are performing a “federal” function; and that the federal government has not created effective oversight mechanisms. DHS should terminate INA §287(g) Memoranda of Agreement (MOAs) with localities that have misused their limited authority. It should engage in meaningful oversight of the conduct of local law enforcement agencies both before and after an INA §287(g) MOA is put in place.

INA §287(g) Agreements Have Contributed to Pervasive Racial Profiling by Local Law Enforcement

In Maricopa County, Arizona Sheriff Arpaio and his deputies have engaged in a widespread pattern and practice of racial profiling in an illegal, improper and unauthorized attempt to enforce federal immigration laws against Latinos without regard for citizenship or valid immigration status. Claiming authority under the INA §287(g) MOA, Arpaio and his deputies in September 2007 launched a series of massive so-called “crime suppression sweeps” by utilizing deputies and volunteer “posse” members. Together they have targeted Latinos for investigation of immigration status, using pretextual and unfounded stops, racially motivated questioning, searches and other mistreatment, and arrests that are often baseless. In 2008, several U.S. citizens sued Sheriff Arpaio and Maricopa County for racial profiling and other racially and ethnically discriminatory treatment.⁶ One plaintiff, Manuel Nieto, a U.S. citizen, was grabbed and handcuffed by several Maricopa County deputies, his face pressed against his car and arms twisted behind his back. This took place in front of his family’s auto repair business. Mr. Nieto’s father ran out of the shop, told the deputies that he owned the shop, and that Mr. Nieto was his child and a U.S. citizen. The deputies then uncuffed Mr. Nieto and ran his identification through their computer system.

⁶ See, Spencer S. Hsu, “Arizona Sheriff Accused of Racial Profiling,” July 17, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/07/16/AR2008071602636.html>.